93-853

Supreme Court, U.S.
FILED
NOV 26 1993
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET S. ROWLAND,
PETITIONER

— V.

ROBERT E. KINGMAN,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF MAINE

APPENDIX OF PETITIONER
VOLUME 2

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CUSTODY ORDER, BEAUDOIN, J.,
AUGUST 17, 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Civil Action
Docket
No. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

ORDER

Pending is Mr. Kingman's Motion for Post-Judgment Relief dated March 25, 1992. Hearings were held on August 6, 1992 and August 13-14, 1992. Both parties were present and represented by counsel.

If Mrs. Rowland relocates to the state of Oregon, it is in the best interests of Edwin and Meagan Kingman

that they primarily reside with Mr. Kingman in Yarmouth, Maine.

Therefore, it is **ORDERED** that the divorce judgment dated May 16, 1991 shall be amended to change the primary physical residence of the children to Mr. Kingman if Mrs. Rowland relocates to Oregon, and on condition that Mr. Kingman reside in Yarmouth, Maine. It is further **ORDERED** that primary physical residence for the children shall remain with Mrs. Rowland if she does not relocate to Oregon, or if Mr. Kingman does not move to Yarmouth as soon as is reasonably possible after Mrs. Rowland's relocation.

Further matters, including rights of parental contact, will be addressed in a subsequent order. That order

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

Pursuant to Rule 79(a) of the Maine Rules of Civil Procedure, the Clerk is directed to enter this order on the Civil Docket by notation incorporating it by reference.

Dated: August 17, 1992

/s/ Roland Beaudoin
Justice, Superior Court

CONTEMPT ORDER, CLEAVES, J.,
AUGUST 27, 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
Docket
No. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

ORDER

After hearing on Defendant's Ex Part Motion for Temporary Restraining Order, to Show Cause, for Contempt, Payment of Expenses, and Attorney's Fees, the Court FINDS, ORDERS and ADJUDGES as follows:

1. The Court finds that Plaintiff and her husband, Arthur LaFrance, have removed the parties' two minor children, Edwin and Meagan, to the State of Oregon. Further,

given the circumstances surrounding the removal of the children as related in Defendant's verified motion, Defendant and the parties' two minor children will suffer immediate and irreparable injury, loss or damage if Plaintiff or her attorney are notified of a hearing on the temporary restraining order. The immediate and irreparable harm includes:

a. Where Plaintiff removed the children to another state in contravention of a final order of this court; where she told the Defendant that she intended to remain in Maine, and then left the State; and where Plaintiff refuses to allow Defendant telephone contact with the children, there exists the likelihood that

Plaintiff will further abscond with the children, or conceal their location if notified of a hearing.

b. The children have been told that they will continue to attend their schools and reside in their community in Yarmouth, Maine. Their sudden move to Oregon will result in further confusion, sadness and anger for them.

c. Both the children and Defendant will suffer immediate and irreparable harm if their long standing routine schedule is not maintained, and they will lose the contact they would have enjoyed with each other, which is irreplaceable in time and quality.

2. The Court grants Defendant's request for an ex parte temporary restraining order, and sets the motion for preliminary injunction for Wednesday, September 9, 1992, at 9:00 a.m., at which time this order shall expire unless extended by the Court. Therefore, the Court enjoins Plaintiff from holding the children in the State of Oregon, and enjoins Plaintiff from withholding the children from Defendant or interfering with the children's return to Defendant's sole and exclusive physical custody in the State of Maine.

3. The Court finds Plaintiff in contempt of its August 17, 1992 Order.

4. The Court hereby amends the Divorce Judgment and its August 17,

1992 Order to grant Defendant *sole* parental rights and responsibilities of the parties' minor children, until further order of the Court.

5. The Court hereby allocates the children's primary residence to Defendant forthwith.

6. Plaintiff is ordered to turn over the children to Defendant forthwith, and to pay Defendant's and the children's hotel and travel expenses incurred to bring the children back to Maine, including all air fare for both he and the children, in the amount of $1,900.00. Execution to issue forthwith.

7. Plaintiff is ordered to pay to counsel for Defendant the sum of $1,190.00, which sum Defendant

incurred in the prosecution of this Motion. Execution to issue forthwith.

8. The Court hereby issues a writ of habeas corpus, requiring Plaintiff to return the children forthwith to the sole and exclusive physical custody of Defendant in Maine.

9. The Clerk is specifically directed pursuant to Rule 79(a) of the Maine Rules of Civil Procedure to enter this Order on the civil docket by notation incorporating it by reference.

Dated: August 27, 1992

/s/ Dana A. Cleaves
Justice, Superior Court

MOTION TO VACATE, ROWLAND
(EXCERPTS), AUGUST 31, 1992

STATE OF MAINE SUPERIOR COURT
CUMBERLAND, ss. Docket
No. CV-89-1047

MARGARET S. ROWLAND, Plaintiff	)	
vs.	)	ORDER TO SHOW CAUSE
ROBERT E. KINGMAN, Defendant	)	

Upon Motion of Defendant for an Order to Show Cause, it is hereby ORDERED pursuant to 14 M.R.S.A. Section 252 and M.R.Crim.P. 42, Plaintiff shall appear before the Cumberland County Superior Court, before the undersigned at 205 Newbury Street, Portland, Maine, on the 9th day of September, 1992 at 9:00 a.m. to show cause why she should not be held in contempt for her failure to comply

with the Order amending the parties' Divorce Judgment dated August 17, 1992, to wit:

1. Plaintiff's willful and malicious interference with the primary residential caretaking rights of Defendant by her refusal to permit the children any access to Defendant in accordance with the Order of August 17, 1992.

2. Plaintiff's ongoing and outrageous interference with the relationship between Defendant and the parties' minor children despite the shared parental rights and responsibilities accorded Defendant under the original Divorce Judgment, and the primary residential rights granted Defendant under the August 17,

1992 Order.

3. Plaintiff's malicious and calculated misrepresentation to Defendant of her intention to relocate to Oregon made for the purpose of deceiving him, so that she and Arthur LaFrance could remove the children to the State of Oregon, without Defendant's knowledge or consent, and despite the Court's contrary directive in its interim Order and the August 17, 1992 Order amending the parties' Divorce Judgment.

Dated: August 27, 1992

/s/ Dana A. Cleaves
Justice, Superior Court

MOTION TO VACATE AUGUST 27, 1992
ORDER, ROWLAND

STATE OF MAINE SUPERIOR COURT
CUMBERLAND, ss. Docket
No. CV-89-1047

MARGARET S. ROWLAND,)
Plaintiff)
)
vs.)
)
ROBERT E. KINGMAN,)
Defendant)

PLAINTIFF'S MOTION TO VACATE THIS COURT'S AUGUST 27, 1992 ORDER WITH INTEGRATED MEMORANDUM OF LAW

Plaintiff, Margaret S. Rowland, M.D., moves the Court to vacate its order of August 27, 1992.

FACTUAL BACKGROUND

On August 27, 1992, this Court issued an Order after hearing Defendant's ex parte motion for Temporary Restraining Order, to Show Cause for Contempt, and payment of

expenses and attorney fees. The Court found, in part, that the Plaintiff's removal of the parties' children from Maine to Oregon was in violation of this Court's August 17, 1992 Order. In fact, there was *no violation* of the August 17, 1992 Order and the August 27, 1992 should be immediately vacated. The August 17, 1992 Order should be reinstated, allowing the Plaintiff to reside with her children in Oregon unless and until the Defendant is found by this Court to have actually moved his residence from Winslow to Yarmouth, Maine, as ordered by this Court, that the residence is suitable and that a change in primary custodian from the mother to the father is found to be in the best

interests of the children.

ARGUMENT

Defendant's counsel, knowing that the undersigned had entered an appearance in this case, knowingly and willfully failed to notify counsel for Plaintiff concerning the Defendant's motion because of some misplaced, erroneous and/or trumped up belief that the undersigned would notify Plaintiff and that she would conceal the children's whereabouts from Defendant.

In fact, Judge Beaudoin's August 17, 1992 Order reads, in pertinent part, as follows:

> Therefore, it is **ORDERED** that the divorce judgment dated May 16, 1991 shall be amended to change the primary physical custody of

> the children to Mr. Kingman *if* Mrs. Rowland relocates to Oregon, *and on condition that Mr. Kingman reside in Yarmouth, Maine.* It is further **ORDERED** that primary physical residence for the children shall remain with Mrs. Rowland if she does not relocate to Oregon, *or if Mr. Kingman does not move to Yarmouth as soon as is reasonably possible after Dr. Rowland's relocation.*

(Emphasis added.)

This Order clearly states that the custodial parent changes *only* if Mr. Kingman relocates to Yarmouth within a reasonable time after Dr. Rowland moves to Oregon. This Court would then have the opportunity to determine whether this newly-established residence would be suitable for the children and whether it would be in their best interests to

live there. Until such time as Mr. Kingman *actually* sets up a home in Yarmouth and the Court determines that the home is a fit one for the children and that the best interests of the children are served by a change in custody, Dr. Rowland is in compliance with this Court's Order.

The Defendant's attorney's verified motion in support of their request for an ex parte order is riddled with false innuendo, misperceptions, misrepresentations and outright falsehoods. It is very difficult to understand how a court would, on this scanty presentation, allow an ex parte order modifying custody to issue.

A. *The Givertz verified*

motion alleges several "facts" that demand immediate rebuttal lest they taint subsequent proceedings in this court.

¶ 1. It is true that the parties have two minor children. Edwin and Meagan. these children have lived with their mother all of their young lives. It is true that this Court awarded shared parental rights and responsibilities as well as providing the Defendant with reasonable visitation rights.

¶ 2. The "facts" stated in ¶ 2 of the Givertz motion are just plain wrong. Defendant *did* have knowledge that the Plaintiff was planning to move to Oregon. Judge Beaudoin's August 17, 1992 Order even provides

for the possibility. Upon information and belief, Defendant was present and overheard a conversation between Dr. Rowland and her new husband that reaffirmed the date for which they had airline tickets for August 24, 1992.

¶ 4. Defendant has provided Dr. Rowland with no information concerning a residence he has found in Yarmouth. Until and unless Dr. Rowland is so informed, and the Court determines that this new residence is in the best interests of the children, she has the right to remain in Oregon with her new husband and her children. This Court cannot be led to believe that just any residence in Yarmouth would automatically be in the children's best interests and a hearing on any

new Yarmouth residence is essential.

¶ 9. Defendant never gave any notice to Dr. Rowland that a lease on a residence in Yarmouth was even a possibility, let alone an imminent event. Had Dr. Rowland known that the Defendant planned an immediate move, she would have reconsidered her options in light of the August 17 Order. The truth of the matter is that she relied on the fact that Defendant made no mention of moving to Yarmouth in finalizing her decision to move to Oregon.

¶ 10. Arthur LaFrance, Dr. Rowland's new husband, did in fact call the Defendant on Tuesday, August 25 from Oregon to inform him of the move. The quotation assigned to

Professor LaFrance in ¶ 10 of the Givertz motion was never uttered. Attached to this motion is a transcript of that phone conversation, which conversation was taped by Professor LaFrance. What Professor LaFrance *actually* stated concerning the time the children were to stay in Oregon is as follows:

> I'm calling to say that Margie, the kids and I arrived yesterday at Lake Oswego and we expect that we will be here until this custody thing is finally resolved.

There was no mention of an appeal. As the parties are well aware, Dr. Rowland has filed a Motion to Reconsider the August 17 Order. It is expected that the Court will hear that Motion and, at the very least,

clarify the intent of the order. However, it must be kept in mind that a removal of the children to Oregon *before* Defendant moved to Yarmouth was not prohibited!

¶ 12. To the time of the drafting of this Motion, despite a request in writing, Defendant has not advised the undersigned of the children's whereabouts or the whereabouts of his Yarmouth residence. Certainly if, as alleged, he "will be signing a lese on his Yarmouth residence," he should be able to provide the information concerning the location.

¶ 17. There is evidence in the record that Meagan, the parties' seven-year old daughter is drawing

pictures of adults having sex. It is suspected that this unauthorized sex education is taking place at the hands of the Defendant's live in girlfriend's two minor sons, Stephen and Ryan McKelvey. The allegation in ¶ 17 of the Givertz motion that the Guardian Ad Litem investigated this situation is correct. The Givertz motion, however, omitted any mention of the Guardian Ad Litem's Findings, to wit:

> Given the parameters of the current situation, the recommendation is made that once Meagan's location has been determined by the Court, she be entered into therapy with an appropriate therapist, who is skilled in this area and that the therapist attempt to establish a sufficient relationship with Meagan for her to discuss what the

> diary refers to. Until such time as that occurs, the father is advised to maintain a level of supervision when they are in his home which takes in to account this new information.

Report, page 14. The diary referred to includes a page upon which Meagan drew a picture of a man lying on top of a woman. There is a noticeable dark oval drawn in the genital area of the man. Meagan is seven years old! (A copy of the pertinent drawing is attached.) Given the Guardian Ad Litem's report that Stephen and Ryan McKelvey, the 10 and 12 year old sons of the Defendant's live-in girlfriend, be supervised, of course Dr. Rowland is concerned about the possible sexual abuse of her child!

¶ 20. The allegation that Dr. Rowland "has not permitted the children to speak with Defendant since their removal" is a lie. As noted in the attached transcript of the August 25, 1992 phone conversation between Arthur LaFrance and the Defendant, the Defendant was invited to call the children.

LaFrance: Do you want the phone number?

Kingman: Yes, I want the telephone number.

LaFrance: All right. 638-4913, area code 503. The kids would welcome a call from you --

Kingman: I'm sure they would Art.

LaFrance: Tomorrow night --

****

Kingman: The number, it's 503

638-4913?

LaFrance: That's correct.

Clearly there was an attempt to get the Defendant to call his children on Wednesday, August 27. Defendant did not call. Dr. Rowland and her children waited until mid-evening for a call, to no avail. It should be noted that the LaFrance/Rowland household has a telephone answering machine. At no time before the Defendant sent two or more hulking police officers to pull his children out of the house in Oregon, without benefit of packing any belongings, did Defendant try to contact the children. In addition, as shown in the transcript, Professor LaFrance did give Defendant their address in Lake

Oswego, Oregon.

The most unfortunate aspect of this case is the way in which the children were ripped from their mother's arms. In so stating this concern, it must be clear that Dr. Rowland's concern is for the children, not for herself. In the early evening of August 28, 1992, two Lake Oswego police officers arrived at the steps of Dr. Rowland's home, Court Order in hand, and demanded that Dr. Rowland give them the children. The Defendant waited on the sidewalk. The children knew only that the police had come for them and that they were not permitted to pack any of their belongings. They were marched away, crying, in their bathing suits. Defendant's assertion

that notice could not be given to Dr. Rowland or her attorneys because of a fear that she would hide the children is unfounded.

WHEREFORE, Plaintiff, Margaret S. Rowland, M.D., respectfully requests the Court to enter an order vacating its Order of August 27, 1992 and reinstating its Order of August 17, 1992.

In the alternative, Dr. Rowland respectfully requests this Court to issue an Order awarding shared parental rights and responsibilities with the children's primary residence to be with her in Yarmouth at her house, pending further resolution of this matter.

Dated: August 28, 1992

/s/ E. Stephen Murray

/s/ Ann M. Courtney
Counsel for Plaintiff

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MOTION FOR WRIT OF ASSISTANCE,
KINGMAN, AUGUST 27, 1992

IN THE CIRCUIT COURT OF THE STATE
OF OREGON
FOR THE COUNTY OF CLACKAMAS

Department of Domestic Relations

In the Matter of the Marriage of	)	
MARGARET S. ROWLAND,	)	No. 92 8 388
Plaintiff,	)	
vs.	)	MOTION FOR WRIT OF
ROBERT E. KINGMAN,	)	ASSISTANCE
Defendant.	)	

Defendant, Robert E. Kingman, by and through his attorney, Susana Alba, moves the court for an order directing that writ of assistance be issued to the sheriff of Clackamas County, Oregon, or any other sheriff or police in recovering the custody the minor

children of the marriage, Edwin Kingman, born January 1, 1983, and Meagan Kingman, born April 17, 1985.

Custody of Meagan and Edwin Kingman was awarded to Robert E. Kingman by order entered n August 27, 1992, by the Honorable Dana Cleaves, Justice Superior Court of the State of Maine for the County of Cumberland.

This motion is based on the affidavit of Robert Kingman, Defendant, attached.

DATED this 27 day of August, 1992.

HOEVET, SNYDER & MILLER, P.C.

/s/ Susana Alba, #89434
of Attorneys for Defendant

Affidavit of Robert Kingman

1. I am the Defendant in the action of *Margaret Rowland v. Robert Kingman*, currently pending in the State of Maine, Cumberland County Superior Court, at docket number 89-CV-1047.

2. I reside at 160A Main St. Yarmouth, Maine.

3. I was formerly married to Margaret Rowland, who resides, upon information and belief, at 7 Scarborough Drive, Lake Oswego, Oregon. She has remarried Arthur LaFrance, who resides at the same address.

4. I have two children, born during my marriage with Margaret Rowland, whose names and dates of birth are Edwin Kingman (date of birth: January

1, 1983) and Meagan Kingman (date of Birth: April 17, 1985).

5. On August 17, 1992, the Cumberland County Superior Court issued an order stating, in pertinent part, "The divorce judgment dated May 16, 1991 shall be amended to change the primary physical residence of the children to Mr. Kingman if Mrs. Rowland relocates to Oregon, and on the condition that Mr. Kingman resides in Yarmouth, Maine." Subsequently, the same court issued a temporary restraining order, inter *alia*, prohibiting Margaret Rowland from keeping the children from me. A copy of that order is attached.

6. The last time I saw my children was on August 22, 1992. I was

scheduled to visit with the children on August 26, 1992. I was contacted by Arthur LaFrance on August 25, 1992, however, who told me that he was in Lake Oswego with my children, and my former wife. He further stated that he would not be returning to Maine and that my children would remain in Oregon with him and my former wife until the appeal process was completed.

Dated at Portland, Maine this 27th day of August, 1992.

/s/ Robert Kingman

STATE OF MAINE
CUMBERLAND, SS. August 27, 1992

The above named Robert Kingman appeared before me and made oath that the facts represented in this affidavit are true to the best of his knowledge and belief.

/s/ Joan Kirby
Notary Public

ORDER AND WRIT, AUGUST 27, 1992

AFFIDAVIT, ORDER AND WRIT, SAMS, J., AUGUST 27, 1992 (OREGON)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

Department of Domestic Relations

In the Matter of the Marriage of	) No. 92 8 388
MARGARET S. ROWLAND, Plaintiff,	) ORDER GRANTING MOTION FOR WRIT OF ASSISTANCE
vs.	
ROBERT E. KINGMAN, Defendant.	

THIS MATTER came before the judge of this court on the motion and affidavit of Susana Alba, attorney for Robert E. Kingman, for an order directing a writ of assistance to be issued to the sheriff of Clackamas

County, Oregon, requesting the sheriff to assist the Defendant in recovering the custody of Meagan and Edwin Kingman, the minor children of this marriage. The court has considered the motion and affidavit filed and being fully advised, now makes this order.

IT IS HEREBY ORDERED that a writ of assistance be issued to the sheriff of Clackamas County, Oregon, directing the sheriff to assist Robert E. Kingman in recovering the custody of Meagan and Edwin Kingman, the minor children of this marriage.

DATED this 27th day of August, 1992.

/s/ Charles A. Sams
Circuit Court Judge

SUBMITTED BY:

Susana Alba, #89434
Of Attorneys for Defendant

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

Department of Domestic Relations

In the Matter of the Marriage of	)	No. 92 8 388
MARGARET S. ROWLAND,	)	WRIT OF
Plaintiff,	)	ASSISTANCE
vs.	)	
ROBERT E. KINGMAN,	)	
Defendant.	)	

TO: THE SHERIFF OF CLACKAMAS COUNTY, OREGON, OR ANY OTHER SHERIFF OR POLICE OFFICER IN OREGON.

GREETINGS:

In this cause, the Court judged that Edwin and Meagan Kingman are being unlawfully withheld by the Plaintiff, Margaret Rowland, and her husband, Arthur LaFrance, and that custody of the child has been awarded

to the Defendant, Robert E. Kingman.

By order of this court dated August 27, 1992, it is ordered that this writ of assistance issue to you.

THEREFORE, IN THE NAME OF THE STATE OF OREGON, you are commanded to proceed to 7 Scarborough Drive, Lake Oswego, Oregon, or wherever Edwin and Meagan Kingman, the minor children, may be found in the state of Oregon, and to take into custody as soon as possible Edwin and Meagan Kingman, and deliver the children to the Defendant, Robert Kingman.

You will use any force necessary to retrieve the children from any parties holding the children.

FINDINGS, CONCLUSION AND ORDER,
BEAUDOIN, J., NOV. 19, 1992

STATE OF MAINE CUMBERLAND, ss.	SUPERIOR COURT CIVIL ACTION DOCKET NO. CV-89-1047
MARGARET S. ROWLAND, Plaintiff vs. ROBERT E. KINGMAN, Defendant	)) FINDINGS OF) FACT,) CONCLUSIONS) OF LAW, AND) ORDER)

Pending is defendant's Motion for Post-Judgment Relief for Modification of Divorce Judgment dated March 25, 1992. Also pending are the following motions filed by plaintiff: Motion for Findings of Fact and Conclusions of Law dated August 21, 1992; Motion for Reconsideration dated August 27, 1992; and Motion to Vacate dated August 28, 1992. Hearings on these

motions were held on August 6, 1992, August 13-14, 1992, September 3-4, 1992, and September 9, 1992. Both parties were present and represented by counsel.

The parties entered into a consent order dated September 24, 1992 concerning parental contact while awaiting the Guardian ad Litem's recommendations. Recommendations were submitted by report dated October 13, 1992. The parties submitted proposed findings of fact and conclusions of law on October 26, 1992. The court was advised by letter dated November 5, 1992 that the parties had agreed to accept the Guardian ad Litem's recommendations concerning parental contact.

This court issued an order dated August 17, 1992. Another Justice issued an order dated August 27, 1992. This court made findings of fact and conclusions of law, and issued an oral order from the bench, on September 9, 1992. In addition, this court makes the following findings, conclusions, and orders.

The parties were married on June 3, 1978. Two children were born of the marriage: Edwin Rowland Kingman (d/o/b 1-13-83) and Meagan Rowland Kingman (d/o/b 4-17-85). The parties were divorced by judgment dated May 16, 1991, which incorporated an agreement of the parties. The divorce judgment provided that the parties would have shared parental rights and

responsibilities, that primary residence for the children would be with Dr. Rowland who resided in Yarmouth, Maine at the time, and that Mr. Kingman would have parental contact "at such reasonable times as may be agreed upon by the parties in advance."

The basic facts which outline the parties' backgrounds, marriage, birth of the children, separation, divorce, and parental contact arrangements are fairly and accurately contained at pages 1-3 of the guardian's report dated August 10, 1992, and admitted into evidence as defendant's exhibit # 2. Those basic facts are adopted by the court, incorporated herein, and need not be repeated.

In February, 1992, Dr. Rowland and the children traveled to Oregon where her present husband, Arthur LaFrance, resided. They toured the community and looked at schools and homes. Shortly after their return to Maine the children told Mr. Kingman about the trip. This was the first indication to Mr. Kingman of a possible move to Oregon. Dr. Rowland and Mr. LaFrance were married on June 14, 1992. Dr. Rowland closed her medical practice on July 31, 1992, after having informed her medical associates of her plans in April, 1992. Her home in Yarmouth, Maine was on the market for sale at the time of the first hearing on August 6, 1992. Mr. LaFrance and Dr. Rowland purchased

a house in Oregon sometime between February, 1992 and the first hearing on August 6, 1992. Dr. Rowland held a farewell party for the children Yarmouth on August 6, 1992, during the course of the proceedings in this case. Dr. Rowland made arrangements for a moving company to pick up her furniture in August, 1992, and had plane tickets for her and the children to Oregon for August 24, 1992. Dr. Rowland had negotiated and arranged part time employment as a doctor for a medical group in Oregon beginning in October, 1992.

19 M.R.S.A. Section 752(12) provides that the intended relocation of children resident in this State to another state by a parent is a

substantial change in circumstances. This provision was enacted in P.L. 1987, Chapter 179. The statement of fact attached to L.D. 1566, which was the presenting bill, states that "Under this new draft, the court must reassess the child's best interests where relocation of the child from the State has occurred or is intended."

Thus, the standard in this case is the "best interest of the child" standard set forth in 19 M.R.S.A. Section 752(5). Although Mr. Kingman has shown a substantial change in circumstances by evidence that Dr. Rowland intends to relocate to Oregon, he has the additional burden of proving that it is in his children's best interest that primary physical

residence for the children should be changed to him.

This burden, however, is evaluated under Section 752(5), and does not require him to satisfy any preliminary or threshold burden of showing, for example, that the intended relocation is motivated by malice or insufficient reasons. Likewise, Dr. Rowland need not satisfy any threshold burden such as may be required under so-called "anti-removal" statutes.

In its application of the best interest standard as set forth in Section 752(5) in a case such as this, the court must be mindful of the appropriate analysis. Dr. Rowland testified that she would not relocate

to Oregon if that was necessary for her to continue as the primary residential parent. Nevertheless, the court must consider her relocation to be inevitable, and the proper test is whether the children's best interests would be better served by a change in primary residence to their father in Maine while their mother resided in Oregon. See, *Lane v. Schenk, Jr.*, (No. 91-447, May 22, 1992, Vermont Supreme Court).

The test which the court applies is *not*, given that Dr. Rowland is willing to stay in Maine, is it in the best interests of her children to force her to remain in Maine. As part of its evaluation, the court must acknowledge a parent's right to move

and "get on with her life", and that a change in primary residence to the other parent would be a substantial event in the children's lives. Nevertheless, the standard remains the best interests of the children. Just as Dr. Rowland should not be faced with a "Sophie's choice" by the court applying an improper test, Mr. Kingman cannot be precluded from asserting that her intended relocation justifies a change in the primary residential parent.

Bruce Kerr, Ph.D., a licensed clinical psychologist, serves as guardian ad litem for the children in this case. His initial report dated August 10, 1992, and initial testimony on August 6, 1992, and August 13,

1992, were thorough, thoughtful, and insightful. The court agrees with his consideration of the facts in Section 752(5) set forth in his August 10, 1992 report and adopts it as its own with the following modification.

Prior to the decision of August 17, 1992, the court had a significantly greater concern than Dr. Kerr about Dr. Rowland's ability and willingness to cooperate with and include Mr. Kingman in an appropriate parental role with his children. This concern was based on the testimony of Dr. Kerr and the parties, and an evaluation of the parties' demeanor and credibility.

This concern was of further significance given the intended move to Oregon, with the obvious increase

in the potential for Dr. Rowland to minimize Mr. Kingman's role simply because of the physical distance between the parties. Therefore, although the suggested schedule for contact between Mr. Kingman and the children if they lived in Oregon appeared to be significant, the court was concerned that it would be minimized by Dr. Rowland at every opportunity. On the other hand, however, the court determined that Mr. Kingman would take the opposite approach, and would foster and encourage contact if the children remained in Maine with him.

After consideration of the factors set forth in Section 752(5), Dr. Kerr did not evaluate and weigh

those factors to determine whether it was in the children's best interests to remain in Maine with their father given that Dr. Rowland was relocating to Oregon. This is the court's ultimate obligation.

Recognizing the factors favoring a relocation to Oregon with Dr. Rowland, the court nevertheless determined that Edwin Rowland Kingman's personality and difficulty in adjusting to change, Edwin's developmental stage where contact with his father is more important now than at later stages, Mr. Kingman's significant involvement in his children's lives even though he was not the primary residential parent which would result in the same impact

on the children by separation from their father as would occur by separation from their mother, the benefits of continuity and stability in the Yarmouth community, the benefits of continued contact with Linda Attanas, the children's desire to remain in Yarmouth and the emotions resulting from a change even though the children do not fully comprehend the significance of their choice, Mr. Kingman's greater ability to foster and cooperate in allowing contact between the children and the other parent living a substantial distance away, and Mr. Kingman's greater willingness to resolve disputes in an appropriate manner all outweighed other factors and resulted in a

determination that it was in the children's best interest to remain in Yarmouth, Maine with Mr. Kingman should Dr. Rowland relocate to Oregon.

Cases such as this involving young children with loving parents who wish to make personal decisions often made without any court involvement are the most difficult for courts to address. There are factors pointing to and favoring the children's move to Oregon with their mother. Nevertheless, this court's exhaustive review of the evidence and evaluation of the factors set forth in Section 752(5) leads to the determination that the children would be better off in Yarmouth, Maine with their father than with their mother in Oregon.

Since Dr. Rowland did testify that she would remain in Maine if necessary to continue as primary residential parent, the court considered that possibility and determined that, essentially for continuity and stability, primary residence would then remain with Dr. Rowland. With such an eventuality, however, the court intended to restructure the parental contact of Mr. Kingman to remove travel to Winslow on Wednesday school nights, and to increase other periods of contact.

This case was originally set for hearing concerning defendant's motion for post-judgment relief for modification of divorce judgment

before another Justice on August 6, 1992. On that date the presiding Justice advised the parties that she could not hear the case because she knew the parties, and the parties advised the Justice that the hearing would take longer than the one day for which it was scheduled. At the suggestion of the presiding Justice, the parties agreed to postpone a full hearing on the motion until late September, 1992, but to present brief testimony to another Justice on the issue of whether the children would relocate temporarily to Oregon with Dr. Rowland as planned for August 24, 1992, pending a full hearing.

That issue was presented to this Justice on the morning of August 6,

1992. After hearing brief testimony from the parents, and testimony from the guardian ad litem that a temporary move to Oregon with the potential for a return to Maine would not be in the best interest of the children, this Justice did not rule on the narrow issue but rearranged the court schedule to accommodate a full hearing before the intended relocation date to prevent the potential of a temporary move. at the completion of the hearings on August 14, 1992, the parties agree with the court's determination that the matter should be taken under advisement over the weekend, that a summary decision should be issued on August 17, 1992, and that a detailed decision would

follow thereafter.

The court has stated on the record its rationale for the August 17, 1992, order. Dr. Rowland testified that she would remain in Maine if necessary to continue as the primary residential parent. There was evidence presented which persuaded the court that primary residence with Mr. Kingman would be in the children's best interest only if Mr. Kingman resided in Yarmouth, Maine, rather than his then current residence in Winslow, Maine. Mr. Kingman testified that he would relocate to Yarmouth if necessary to become the primary residential parent.

As a result of this testimony, and the procedural posture of the

case, it was appropriate, and beneficial to the children and parties, for the court to address these potential developments. The court's August 17, 1992, order, in the context of the evidence presented and the procedural circumstances of this case, clearly states that the children would reside in Yarmouth with Mr. Kingman if Dr. Rowland relocated to Oregon, that Mr. Kingman must move to Yarmouth within a reasonable time *after* Dr. Rowland relocates, but that if Dr. Rowland decided to remain in Maine the children would continue to reside with her. There is no indication in that order, especially given the circumstances of this case, that Dr. Rowland could relocate to

Oregon with the children before Mr. Kingman moved to Yarmouth, or that another hearing was necessary after he moved to determine the suitability of the residence. Dr. Rowland's attorney's statement that such an order makes no sense and is unworkable is absolutely correct. The order does not state or allow what Dr. Rowland's attorney asserts.

Dr. Rowland's actions subsequent to the August 17, 1992 order have been motivated by her personal interests, not the best interests of her children.

Dr. Rowland intentionally and knowingly took steps to surreptiously relocate to Oregon with the children. She provided deceptive answers to her

son and Mr. Kingman about her intentions. her testimony that she did not inform Mr. Kingman that she was leaving because she was concerned about "a scene at the airport" is only partially true. She knew that Mr. Kingman would disagree with her interpretation of the August 17 order, and she knew that Mr. Kingman could obtain an order preventing the children's departure had she been completely honest with him. Her testimony that several attorneys other than her current attorney's office advised her that the order permitted her to leave with the children is not credible. Her testimony that she did not tell the lawyers about the procedural posture of the case

essentially because she did not perceive it to be significant is not credible. Dr. Rowland was motivated to accomplish what she had felt was inevitable all along despite the August 17 order. Dr. Rowland intentionally violated the August 17 order, despite any advice from her lawyer who was not provided with critical information, and she is in contempt of court by her actions.

Even if this court were to make contrary findings concerning Dr. Rowland's motivation, the conclusion would be similar. Dr. Rowland conceded that she knew Mr. Kingman would have a different interpretation of the August 17 order, yet she chose to surreptitiously remove the children

from the state after deceiving her son and Mr. Kingman, rather than seek clarification of the order. This action alone reflects a significant lack of concern for her children's best interests.

Dr. Rowland and Mr. LaFrance flew to Lake Oswego, Oregon on August 24, 1992 without notice to Mr. Kingman. When her son had asked if his father knew they were leaving, Dr. Rowland responded that he knew they had plane tickets. When Mr. Kingman had asked if she was going to relocate to Oregon, Dr. Rowland replied that she would remain in Maine if necessary to continue as primary residential parent. These discussions took place after the August 17 order and before

the August 24 plane trip.

Mr. Kingman first became aware of the children's presence in Oregon by a phone call to him from Mr. LaFrance on August 25, 1992. Mr. Kingman then obtained an ex parte order from another Justice on August 27, 1992 ordering the children's return to Maine. Mr. Kingman flew to Oregon with the Maine court orders, obtained a writ of assistance from an Oregon court, and contacted the local Lake Oswego police. The police went to Dr. Rowland's home in Oregon on August 27, 1992, while Mr. Kingman remained outside, removed the children from the home, and returned them to Mr. Kingman. Mr. Kingman then immediately flew back to Maine.

Mr. Kingman obtained an apartment in Yarmouth as of August 26, 1992, and the children resided there with him until the agreed-to order of September 24, 1992. Dr. Rowland has also returned to Yarmouth, and testified again that she would remain in Yarmouth if necessary to continue as primary residential parent. Contact between the children and Dr. Rowland has gradually increased since their return to Maine.

The court has reconsidered its August 17 order pursuant to both the motion for findings of fact and conclusions of law and the motion to reconsider. Dr. Kerr's most recent testimony, and the other evidence presented does not alter this court's

findings and conclusions, but rather reinforces them.

The court seriously considered that it might be in the best interests of the children to primarily reside with Mr. Kingman in Yarmouth even if Dr. Rowland remains in Yarmouth. It is the court's determination, however, that, especially with recent events, the children are most in need of the continuity and stability that can be provided by residing in the home they have known with a somewhat similar pattern of parental contact as existed prior to August 17, if Dr. Rowland remains in Yarmouth. It is also the court's determination that increased parental contact with Mr. Kingman in addition to the contact prior to

August 17 is in the children's best interest, if Dr. Rowland remains in Yarmouth.

The parties have agreed to the parental contact schedule outlined in Dr. Kerr's report dated October 13, 1992. The court adopts those recommendations as findings and orders of this court and incorporates the report herein.

The court has not addressed the issue of parental contact with Dr. Rowland should she relocate to Oregon. She has testified several times that this will not occur. Should she relocate, the question of parental contact can be addressed at that time.

Mr. Kingman is employed and earns $27,000.00 per year. As of the last

hearing he owned a home in Winslow, Maine and rented an apartment in Yarmouth. Dr. Rowland was previously in private practice in Yarmouth earning approximately $81,000.00 per year. She had negotiated an arrangement with a medical group in Oregon to earn $35,000.00 per year for part time employment. She was unemployed in Maine at the time of the last hearing. She testified on August 14, 1992, that if she invested and made an effort, her patient base in Yarmouth would return over a short period [of] time. The court finds that Dr. Rowland has the ability to earn at least $35,000 per year in Oregon or Maine. A deviation from the child support guidelines amount is not

appropriate because both parties have increased and unique expenses resulting from this court's decisions.

Dr. Rowland's opinions about child care for her children are motivated by emotions of anger and disappointment at this time. It is in the best interests of the children that the right to determine child care be allocated to Mr. Kingman.

At the last hearing on September 9, 1992, a non-testimonial hearing, Dr. Rowland's attorney raised objections to portions of Dr. Kerr's prior testimony and requested that it be stricken from the record. The court concludes that these objections are waived because not timely made at the time of or during the hearing at

which Dr. Kerr's testimony was taken. Had the court sustained the objections and/or stricken the testimony at the hearings when the testimony was taken, Mr. Kingman's attorney would have had the opportunity to restructure the questioning and/or present other evidence. This opportunity was lost because of the delay in objecting.

Much of Mr. Kingman's attorney's services, and Dr. Kerr's services, since the August 17 order are the result of Dr. Rowland's intentional violation of the order. In addition to her ability to earn income, Dr. Rowland has other assets which provide her with an ability to pay attorney's fees and the guardian ad litem's fees. See, e.g., *Gray v. Gray*, 609 A.2d 694,

699 (Me. 1992).

Therefore, it is **ORDERED** that:

1. The divorce judgment dated May 16, 1991 is modified as set forth below. In all other respects, the judgment remains in full force and effect.

2. The court's order dated August 27, 1992 is modified to the extent contradicted below. In all other respects, the order remains in full force and effect.

3. This court's order dated August 17, 1992 remains in full force and effect as supplemented below.

4. If Dr. Rowland relocates to Oregon, primary physical residence for Edwin Rowland Kingman and Meagan Rowland Kingman shall be with Mr.

Kingman. Dr. Rowland shall notify Mr. Kingman in writing of her intention to relocate at least 14 days before the relocation. If Dr. Rowland relocates to Oregon, the parties may request a determination of rights of parental contact for Dr. Rowland with the children.

5. If Dr. Rowland remains in Yarmouth, Maine, primary physical residence for Edwin Rowland Kingman and Meagan Kingman shall be with Dr. Rowland. parental rights of contact shall be as set forth in Dr. Bruce Kerr's report dated October 13, 1992 which is incorporated herein. When the children are in the presence of Stephen and Ryan McKelvey, Mr. Kingman shall maintain a heightened level of

supervision, but not necessarily the constant, second-by-second presence of an adult.

6. Neither party shall remove the children from the state of Maine without 72 hours prior notice to the other party.

7. The parties shall have allocated parental rights and responsibilities whether Dr. Rowland resides in Oregon or Maine as follows: Mr. Kingman shall have the right to determine day care matters for the children; all other parental rights and responsibilities shall be shared.

8. If Dr. Rowland remains in Maine, the court has made certain findings of fact concerning child support on the attached child support

worksheet which is incorporated herein. Mr. Kingman shall pay child support to Dr. Rowland in the amount of $94.64 per week for the support of two children. The payments shall commence on November 20, 1992. In addition, Dr. Rowland shall pay 56% of any child care expenses for the children, and Mr. Kingman shall pay the remaining 44%. If Dr. Rowland relocates to Oregon, the court will re-compute child support.

9. Dr. Rowland shall be responsible for 77% of Dr. Bruce Kerr's bill for services up to and including August 13, 1992 because of her greater ability to pay, and Mr. Kingman shall be responsible for the remainder of the bill up to and

including August 13, 1992. Dr. Rowland shall be responsible for 95% of Dr. Kerr's bill from August 28, 1992 up to and including October 18, 1992 because of her greater ability to pay and because her actions generated the need for much of those services. Mr. Kingman shall be responsible for the remaining 5%. Dr. Rowland shall be responsible for 80% of Dr. Kerr's expenses up to October 18, 1992, and Mr. Kingman shall be responsible for the remaining 20%. Dr. Rowland shall receive a credit for the $5,000.00 she has already paid.

10. Dr. Rowland shall pay to Givertz, Lunt, Hambley & Scheffee the sum of $4,500 for services rendered to Mr. Kingman since the filing of

plaintiff's various motions.

Execution shall issue forthwith.

Pursuant to Rule 79(a) of the Maine Rules of Civil Procedure, the Clerk is directed to enter this order on the Civil Docket by notation incorporating it by reference.

Dated: November 19, 1992

/s/ Roland Beaudoin
Justice, Superior Court

NOTICE OF APPEAL, ROWLAND, DECEMBER 1992

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET
NO. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

NOTICE OF APPEAL

Pursuant to Rule 73(b) of the Maine Rules of Civil Procedure, Plaintiff, Margaret S. Rowland, hereby appeals to the Maine Supreme Court from the Findings of Fact, Conclusions of Law and Order of Justice Roland Beaudoin in this action dated November 19, 1992.

Dated at Portland, Maine this 1st day of December, 1992.

/s/ Ann M. Courtney, Esq.
E. Stephen Murray, Esq.
Attorneys for Plaintiff

MURRAY, PLUMB & MURRAY
75 Pearl Street
Portland, Maine 04101
(207) 773-5651

NOTICE OF APPEAL, KINGMAN, DECEMBER 1992

STATE OF MAINE
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SUPERIOR COURT
CIVIL ACTION

DOCKET
NO. CV-89-1047

MARGARET S. ROWLAND,
Plaintiff

vs.

ROBERT E. KINGMAN,
Defendant

NOTICE OF APPEAL

Pursuant to Rule 73(b) of the Maine Rules of Civil Procedure, Defendant, Robert E. Kingman, hereby appeals to the Maine Supreme Judicial Court from the Findings of Fact, Conclusions of Law and Order of Justice Roland Beaudoin in this action dated November 19, 1992.

DATED at Portland, Maine, this

8th day of December, 1992.

/s/ Phyllis G. Givertz

/s/ Elizabeth J. Scheffee
Attorneys for Defendant

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